No. 14,409

IN THE

United States Court of Appeals

For the Ninth Circuit

CLAUDE E. SPRIGGS, *Appellant,*	
vs.	
UNITED STATES OF AMERICA, *Appellee.*	

Appellant's Reply Brief

Appeal from the United States District Court
for the District of Arizona.

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REPLY TO APPELLEE'S PLEADINGS

The appellant disagrees with the appellee in that the plea in bar covered both double jeopardy and res judicata but points out to the Court that the appellant's plea in bar was upon double jeopardy only (TR 6 thru 11). This is shown further by the fact that the appellee's motion of plaintiff for rehearing of defendant's plea in bar has designated thereon "double jeopardy". This is in answer to paragraph 2 of appellee's "pleadings" on page 3 of appellee's brief.

In further reply to appellee's pleading, paragraph 2 on page 4 of appellee's brief, the appellant disagrees with

appellee that said pleas are "in reality directed to paragraphs designated (a) and (b)"; but the appellant urges that the pleas are not limited to (a) and (b) but are to (a) and (b) and the third matter of depreciation and are in fact directed to the whole of the indictment.

In reply to the third paragraph on page four of appellee's brief the appellant calls the court's attention to the fact that the appellee has mis-quoted the record in that he stated in paragraph 3, page 4 of appellee's brief "that the question of 'res judicata,' but not the question of double jeopardy." The appellant calls the court's attention that the plea in bar as to double jeopardy was filed in the trial court on January 15th, 1954, that the court on the 25th day of February, 1954, granted the plea in bar and denied it in part. That on the 12th day of March, 1954, the United States attorney, for and in behalf of appellee, filed a motion of plaintiff for rehearing of defendant's plea in bar (double jeopardy); that the motion of plaintiff for rehearing on defendant's plea in bar (double jeopardy) was granted by order of the court on the 22nd day of March, 1954 (TR 28-29). That thereafter, on the 29th day of March, 1954, the appellant filed his motion to dismiss (or quash) indictment (plea of res judicata). Therefore the matter of res judicata was not brought to the United States Attorney's attention or to the trial court's attention prior to March 29, 1954 and the United States Attorney could not have understood that the plea in bar was upon the ground of res judicata, on the 25th day of February, 1954 (TR 18-19), for it was not brought to his attention for the period of one month, thereafter.

The appellant in reply to paragraph 1 on page 5 of appellant's brief denies that the "applicability of the doctrine of res judicata is, we submit, the principal question raised on this appeal." We respectfully submit that we would like to

have this Court consider all of the specifications of error and not limit its consideration to one specification of error as set out by the appellee.

In reply to paragraph 1 under the "issues" on page 5 of appellee's brief the appellant disagrees with appellee that only three questions are raised in this appeal but urge that, first, double jeopardy; second, res judicata; third, lack of jurisdiction to re-indict; fourth, extra judicial confession will not be admitted unless corroborated by other evidence, and fifth, the evidence is not sufficient to support the verdict and judgment of guilty and the appellant would not like to be limited to only three questions before this court as set out by the appellee.

The appellant, in reply to paragraph 1 of appellee's "Statement of Facts" on page 7 of appellee's brief, denies that the only issues involved in this appeal "are principally legal and not factual" but the appellant urges that the questions before this Court on this appeal are both legal and factual.

The appellant in reply to paragraph 3 of the appellee's "Statement of Facts" on page 8 of appellee's brief, calls the Court's attention to the testimony of Charles E. Dyer and Charles A. Mathis in that the Transcript of Record of their testimony shows that they were only employees of the appellant and did not completely finish any contract for the appellant (TR 150-169).

The appellant in reply to appellee's "Statement of Facts" paragraph 1 on page 9, is to the effect that the statement therein "the $5500.00 item is the improved 'COLLINS PROPERTY' " is the OPINION of the counsel for appellee and the Transcript of Record does not so show.

Appellant in answer to paragraph 2 of appellee's "Statement of Facts," page 9 of appellee's brief, denies that "Mr.

C. L. Howard's testimony ESTABLISHES that both $20,000.00 items refer to the 'Henshaw Road property'" but in fact the testimony of C. L. Howard does not at any time or anywhere mention the "Henshaw Road property" (TR 128-132).

The appellant in reply to appellee's "Statements of Facts," paragraph 5 on page 9 of appellee's brief, denies that the testimony of Mr. Sruckmeyer had anything to do whatsoever with the tax return of 1947, the matter at bar, for the reason that his testimony shows said conversations took place during the years 1943 to 1946.

REPLY TO APPELLEE'S PROPOSITIONS OF LAW

The indictment in the present case may be divided into three specific categoric items (a) and (b) were previously contained in the indictment found against the appellant in Criminal Cause C-9558, Phx, which was reviewed by this court in the case of *Spriggs v. United States,* 198 Fed. (2) 782. This court in its opinion states that the appellant was acquitted upon portions of Count III; these portions of Count III are items (a) and (b), involved in the present indictment. It was within the power of the trial court under the provisions of Rule 29 of the Federal Rules of Criminal Procedure to direct a judgment of acquittal be entered. This court, in its opinion, has accepted the propositions, the entry of judgment of acquittal of these items was, and constituted an acquittal of the appellant. The appellee did not complain of the ruling and this ruling has become final.

Wilson v. United States, 166 Fed. (2) 527.

The third element in the indictment of this case consists of depreciation overstated as appears in the Transcript of Record. This is the same element as that considered by this court in its former decision. The Court, by its decision,

found there was insufficient evidence to sustain the verdict of conviction as to this element and the judgment of conviction was reversed, thereafter on October 15th, 1952, the United States District Court, District of Arizona, in Cause No. C-9558, in conformity with the mandate of the Court of Appeals entered an order dismissing the former indictment en toto. This dismissal was consistent with Rules 29 and 48 of the Federal Rules of Criminal Procedure. This court, in *Korn v. United States,* 158 Fed. (2) 568 (Ninth Circuit) held that the proper procedure on the reversal of the case for insufficient evidence was that it would be reversed and a judgment of acquittal entered upon such reversal. As the court pointed out in the *Korn* case such action could be taken under Rule 29. The action could further be sustained under the provisions of Rule 48 which provides "that the United States Attorney by leave of Court may file a dismissal of indictment, information or complaint and further that such dismissal shall effect a termination of prosecution."

In construing this rule the District Court (Conn) in *United States v. Doe,* 101 Fed. Supp. 609, held such action could be taken only upon a showing that the government lacks evidence to warrant prosecution.

The Court in the case of *United States v. Northwest Telegraph Company,* 52 Fed. Supp. 973, held "upon reversal by the appellate court the trial court, though receiving the case for the retrial is bound by all its rules 'as the law of the case'". *Seagraves v. Wallace,* 69 Fed. (2) 163; *Peavy-Byrnes Lumber Co. v. Com'r,* 86 Fed. (2) 234.

It makes little difference whether or not this order of dismissal is called a dismissal or a judgment of acquittal. In either event it has the effect of an acquittal and therefore, all three sections (a), (b), and the depreciation overstated,

the whole of the Bill of Particulars is barred by the doctrine of former jeopardy.

The court by its order reinstating the indictment en toto after he had entered an order granting the plea in bar in part was in fact an assumption by the court of the duties of the Grand Jury since the Grand Jury is the only body or person that may indict a person after dismissal. The granting of the plea in bar in part constituted the dismissal of that portion of the indictment and under the case of *Ex Parte Bain,* 121 U.S. 1, and the voluminous cases thereunder, holds that only the Grand Jury may file an indictment against a defendant.

The appellee has from page 15 to page 29 of his brief, argued the matter of res judicata, same being in the line of argument that res judicata does not apply to criminal matters or as he states, should not apply to criminal matters. It is contrary to the weight of authority in that our Federal Courts have practically universally held and all the text books are in conformity therewith that the doctrine of res judicata does apply to criminal matters and to argue the point in this brief would be an insult to the intelligence of this Court.

In answer to appellee's argument of the sufficiency of the evidence, the appellant points out to the court that only one witness, Lloyd Tucker, agent for the Internal Revenue Department, is the only witness testifying as to depreciation of the Henshaw Road property and this court has already held in the opinion case, that this evidence is insufficient since it is based only upon the admissions, statements or confession of the appellant and no other evidence having been produced the extra judicial confession should not be admitted unless corroborated by other evidence, and since no other evidence was produced in this trial the evidence is insufficient to convict.

REPLY TO APPELLEE'S CONCLUSIONS

Since the doctrine of former jeopardy together with the doctrine of res judicata applies to the whole of the indictment and the insufficiency of the evidence is to the whole of the indictment the appellant's motion for judgment of acquittal to the indictment herein should be granted and the lower court instructed to enter a judgment of acquittal, or in the alternate that a new trial be granted.

Respectfully submitted

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